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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 INTELlicHECK MOBILISA, INC.,

11 Plaintiff,

12 v.

13 HONEYWELL INTERNATIONAL  
14 INC.,

15 Defendant.

CASE NO. C16-0341JLR

ORDER GRANTING LEAVE TO  
FILE SECOND AMENDED  
COMPLAINT

16 **I. INTRODUCTION**

17 Before the court is Plaintiff Intellicheck Mobilisa, Inc.'s ("Intellicheck") motion  
18 pursuant to Federal Rule of Civil Procedure 15(a)(2) for leave to file a second amended  
19 complaint. (Mot. (Dkt. # 57).) Having reviewed the submissions of the parties, the  
20 balance of the record, and the applicable law, the court GRANTS Intellicheck's motion.  
21 Intellicheck must file its second amended complaint (Dkt. # 57-1) no later than seven (7)  
22 days after the entry of this order.

## II. BACKGROUND

Intellicheck filed its original complaint on March 7, 2016, against Defendant Honeywell International, Inc. (“Honeywell”) alleging various counts of patent infringement under theories of direct, induced, and contributory infringement. (*See generally* Compl. (Dkt. # 1).) Honeywell moved to dismiss Intellicheck’s induced and contributory infringement claims. (MTD (Dkt. # 25) at 2-3.) Subsequently, Intellicheck amended its complaint (FAC (Dkt. # 30)), which Honeywell again challenged in a motion to dismiss, this time attacking all asserted claims (2d MTD (Dkt. # 37) at 1-4).

The parties then filed a stipulated motion to temporarily stay the matter and extend the trial date for six months to explore the possibility of settlement. (Stip. Mot. (Dkt. # 48) at 1-2.) The court declined to stay the case but extended the trial date as requested and denied Honeywell’s pending motions as moot without prejudice to renew those motions at a later date. (Order (Dkt. # 49) at 1-2.) During the ensuing period, the parties engaged in negotiations but ultimately failed to reach a settlement. (Sanks Decl. (Dkt. # 58) ¶ 2.) The discovery cut-off set by the court is not until March 30, 2018, and trial is scheduled to commence on September 10, 2018. (Min. Order (Dkt. # 50) at 1-2.)

Intellicheck now petitions the court for leave to file a second amended complaint, seeking to (1) add factual contentions in response to new deficiencies allegedly raised by Honeywell for the first time during negotiations; and (2) remove its five counts of contributory infringement. (Mot. at 2; *see also* SAC (Dkt. # 57-1).) Honeywell opposes the motion, arguing that the new deficiencies asserted by Intellicheck had already been raised in its motions to dismiss. (Resp. (Dkt. # 61) at 3-7.)

### III. ANALYSIS

Federal Rule of Civil Procedure 15(a) provides that, after the initial period for amendments as of right, pleadings may be amended only with the opposing party's written consent or by leave of court. Fed. R. Civ. P. 15(a)(2). Generally, "the court should freely give leave [to amend pleadings] when justice so requires." *Id.* This rule should be interpreted and applied with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). The court ordinarily considers five factors when determining whether to grant leave to amend a complaint: "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff has previously amended his complaint." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). The third factor, prejudice to the opposing party, is the "touchstone of the inquiry under rule 15(a)." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). The burden is on the party opposing amendment to show that amendment is not warranted. *Wizards of the Coast, LLC v. Cryptozoic Entm't, LLC*, 309 F.R.D. 645, 649 (W.D. Wash. 2015).

Beginning with the "touchstone" of the inquiry, the court concludes that the prejudice factor weighs in favor of amendment. Honeywell asserts only that allowing Intellicheck to amend its complaint once more "would result in Honeywell incurring the cost of having to draft a third motion to dismiss." (Resp. at 9.) This assertion is insufficient to establish prejudice. If Intellicheck had sought to amend its complaint in a manner that would put Honeywell through "the time and expense of continued litigation on a new theory, with the possibility of additional discovery," then it is conceivable that

1 leave to amend would cause undue prejudice. *See Ascon Props., Inc. v. Mobil Oil Co.*,  
2 866 F.2d 1149, 1161 (9th Cir. 1989). But Intellicheck does not seek to assert new  
3 theories of litigation. (*See generally* SAC.) In fact, it seeks the opposite—to remove five  
4 counts from its complaint. (*See* Mot. at 2; SAC at 15-17, 27-29, 35-37, 44-46, 52-54.)  
5 And as noted above, Honeywell has ample time to combat the additional factual  
6 allegations Intellicheck would raise in a second amended complaint, as the discovery  
7 cutoff is not for another six months and trial is over a year away. (*See* Min. Order at 1-2.)

8 Nor is there evidence of bad faith on the part of Intellicheck that would counsel  
9 denial of leave to amend. Honeywell contends that Intellicheck should have known about  
10 the deficiencies in its amended complaint and that Intellicheck offers no reason “why it  
11 has taken over a year for it to seek leave to amend allegations.” (Resp. at 6.) But “delay  
12 alone does not amount to bad faith.” *Wizards of the Coast*, 309 F.R.D. at 651. And there  
13 is simply no evidence that Intellicheck “act[ed] with intent to deceive, harass, mislead,  
14 delay, or disrupt.” *See id.* Even accepting Honeywell’s assertion that Intellicheck  
15 “should be more than aware” of the deficiencies (Resp. at 6), “‘bad faith’ means more  
16 than acting with bad judgment or negligence,” *see Wizards of the Coast*, 309 F.R.D. at  
17 651.

18 Moreover, leave to amend would cause no undue delay. Undue delay is  
19 considered in the context of (1) the length of the delay from the time the moving party  
20 obtained relevant facts; (2) whether discovery has closed; and (3) proximity to the trial  
21 date. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 798-99 (9th Cir. 1991). Intellicheck argues  
22 that it learned of relevant facts on April 3, 2017, during settlement negotiations, when

1 Honeywell asserted that the amended complaint failed to allege product markings (Mot.  
2 at 3; Sanks Decl. ¶ 3), whereas Honeywell insists that Intellicheck was already aware of  
3 this deficiency because it had been raised in previous motions to dismiss (Resp. at 4-5).  
4 The court agrees with Intellicheck. Although previous motions to dismiss have argued  
5 the issue of knowledge generally, these motions did not touch on the specific issue of  
6 markings. (See MTD at 2-3; 2d MTD at 3.) Honeywell did not raise this exact issue until  
7 April 3, 2017, when it stated that the amended complaint “does not allege marking any  
8 tangible products” and thus, pursuant to the actual notice requirements of 35 U.S.C.  
9 § 287(a), cannot sustain the recovery of full damages. (See Yohannan Decl. (Dkt. # 62)  
10 Ex. A at 8-9). Seeking leave to amend three-and-a-half months after Honeywell pointed  
11 out the deficiency does not constitute undue delay, especially when discovery has not yet  
12 closed and the trial is more than a year away.

13       Additionally, leave to amend would not be futile. A proposed amendment is futile  
14 “only if no set of facts can be proved under the amendment to the pleadings that would  
15 constitute a valid and sufficient claim.” *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214  
16 (9th Cir. 1988). Denials based upon futility are rare. *Netbula, LLC v. Distinct Corp.*, 212  
17 F.R.D. 534, 539 (N.D. Cal. 2003). In its futility argument, Honeywell merely asserts that  
18 the second amended complaint fails to meet pleading standards. (Resp. at 7.) This  
19 challenge related to the sufficiency of the proposed second amended complaint, even if  
20 merited, remains better left for full briefing on a dispositive motion to dismiss. See  
21 *Pilavskaya v. Henderson*, No. CV 11-4075 CAS (Ex), 2012 WL 3279517, at \*5 (C.D.

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1 Cal. Aug. 9, 2012) (“Whether . . . claims are properly pled is better left for a motion to  
2 dismiss.”).


3 Honeywell is correct that Intellicheck has previously amended its complaint, the  
4 final factor for consideration under Rule 15(a). (*See* Resp. at 3.) A district court’s  
5 discretion to deny amendment is “particularly broad” when a plaintiff has already had  
6 one or more opportunities to amend. *Ascon Props.*, 866 F.2d at 1160. But a previous  
7 amendment is not dispositive, *see Wizards of the Coast*, 309 F.R.D. at 654, and it alone  
8 cannot outweigh the other factors here—particularly the lack of prejudice—that favor  
9 amendment. Because the court should freely grant leave to amend under Rule 15(a)(2),  
10 and Honeywell establishes neither prejudice nor a strong showing of any other factor  
11 compelling against the amendment, the court grants Intellicheck’s motion for leave to  
12 amend.

#### 13 IV. CONCLUSION

14 Based on the foregoing, the court GRANTS Intellicheck’s motion for leave to file  
15 a second amended complaint (Dkt. # 57), and authorizes Intellicheck to file a second  
16 amended complaint in the form attached as Exhibit 1 to the motion (Dkt. #57-1) within  
17 seven (7) days of the entry of this order.

18 Dated this <sup>th</sup>30 day of August, 2017.

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JAMES L. ROBART  
United States District Judge